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Norway

ACQUISITION FINANCE

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This country-specific Q&A provides an overview of acquisition finance laws and regulations applicable in Norway.

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NORWAY
ACQUISITION FINANCE

1. What are the trends impacting acquisition finance in your jurisdiction and what have been the effects of those trends? Please consider the impact of recent economic cycles, Covid-19, developments relating to sanctions, and any environmental, social, and governance ("ESG") issues.

Norway has an open and internationally oriented economy, heavily weighted towards export. The Norwegian economy is primarily influenced by the developments in the oil and offshore sectors, but with increasing activity and interest observed in the major green shift into more renewable energy sources such as onshore and offshore wind and hydro power. The deal value for energy-related M&A transactions remains high. Deal value within the tech sector is also on the rise, and this trend must be expected to continue in the future.

The last couple of years has seen an increased public focus on ESG issues across all business and activities. While formal ESG-reporting has been voluntarily for most entities, there is a shift in the public requirements for ESG-reporting and due diligence from 'soft' to 'hard' law through implementation of new legislation.

2. Please advise of any recent legal, tax, regulatory or other developments (including any reforms) that will impact foreign or domestic lenders (both bank and non-bank lenders) in the acquisition finance market in your jurisdiction.

Norwegian borrowers are, with effect from 1 July 2021, subject to withholding taxes on withholding taxes on interest payments made under loan transactions between certain related parties. There is currently no proposal for withholding taxes being imposed on interest payments made to non-related (third party) lenders like banks.

As a consequence of the COVID-19 outbreak and the subsequent financial distress, a new temporary Act on Reconstruction (the "**Reconstruction Act**") entered into force in 2020 which contains several new developments intended to make court-supervised restructuring more effective. The Reconstruction Act is scheduled to be repealed on 1 July 2023 and replaced by a new permanent reconstruction act. The Reconstruction Act has been successfully tested in practice in several large-scale restructurings.

3. Please highlight any specific high level issues or concerns in your jurisdiction that should be considered in respect of structuring or documenting a typical acquisition financing.

Norway has traditionally had strict rules concerning the granting of a guarantee, loan or any security interest (jointly referred to as "**Financial Assistance**") by a target company, but it is now possible to obtain Financial Assistance from a Norwegian target company in certain circumstances and subject to a "whitewash" procedure being carried out. We refer to item 14 for a further description.

4. What are the legal and regulatory requirements for banks and non-banks to be authorised to provide financing to, and to benefit from security provided by, entities established in your jurisdiction?

The general rule under the Norwegian Financial Institutions Act 2015 is that anyone providing, intermediating, guaranteeing or in other ways facilitating the financing of anything other than their own business ("**Financing Activities**") requires a license as a finance institution. Financing Activities may be conducted pursuant to the following types of licenses:

- License as a bank;
- License as a mortgage credit institution; and

- License as a finance company

Foreign credit institutions licensed as such in the EEA may provide Financing Activities in Norway based on their home state license under framework for mutual recognition under the CRD IV directive (the so called 'passporting rules'). The taking of security is not a licensable activity as such.

5. Are there any laws or regulations which govern the advance of loan proceeds into, or the repayment of principal, interest or fees from, your jurisdiction in a foreign currency?

No. Norway does not impose currency exchange controls or limits, and there are no laws or regulations which impose restrictions on the ability of a loan to a Norwegian borrower to be advanced and/or repaid in a foreign currency.

6. Are there any laws or regulations which limit the ability of foreign entities to acquire assets in your jurisdiction or for lenders to finance the acquisition of assets in your jurisdiction? Please include any restrictions on the use of proceeds.

No. Certain industry areas require licenses, however.

7. What does the security package typically consist of in acquisition financing transactions in your jurisdiction and are there any additional security assets available to lenders?

A common security package in acquisition financings usually consists of:

a. a charge over the target shares and its (material) subsidiaries;
b. floating charges over a debtor's trade receivables, its inventory and its operating assets as well as motor vehicles and construction machines;
c. mortgages over real registered assets (such as real estate, vessels, aircrafts);
d. assignment of specific monetary claims, including over bank accounts.

One can also take security over certain licenses, IP rights and more.

8. Does the law of your jurisdiction permit (i) floating charges or any other universal security interest and (ii) security over future assets or for future obligations?

Norwegian law does not have a concept of a floating charge over all assets, but much of the same effect can be achieved by creating floating charges over specific asset classes (together with specific security over shares, monetary claims, assets etc. as further described above under item 7).

Security over future assets and obligations can be granted in certain circumstances only:

a. the floating charges described in item 7 above;
b. future monetary claims in a specifically defined legal relationship (with debtor identified).

9. Do security documents have to (by law) include a cap on liabilities? If so, how is this usually calculated/agreed?

In guarantees and third-party security rights granted in favour of a financial institution, the maximum amount to be secured or the amount of the secured obligations must be set out in the security agreement for the security right to be valid. That also applies to most security rights. Market practice is to cap liabilities on 120-125% of the principal amount of the guaranteed obligation, plus interest, default interest, costs and expenses.

10. What are the formalities for taking and perfecting security in your jurisdiction and the associated costs and timing? If these requirements are different for different asset classes, please outline the main points to note for each of these briefly.

a. Shares security: notice to the company whose shares have been charged;
b. Mortgages over real registered assets and the floating charges mentioned above: filing standard forms with the relevant Norwegian registry;
c. Assignment of specific monetary claims, including bank accounts: notice to the debtor of the claim/account bank.

See item 12 for commentary on costs.

11. Are there any limitations, restrictions or prohibitions on downstream, upstream and cross-stream guarantees in your jurisdiction? Please also provide a brief description of any potential mitigants or solutions to these limitations, restrictions or prohibitions.

Without limiting the provisions of item 14, the Companies Act restricts generally the ability for a Norwegian company to provide any Financial Assistance for the debt of shareholders or close associates of the shareholders.

The Norwegian company may, however, provide Financial Assistance for the debt of a parent company or another company in the same group of companies as the Norwegian company, provided that such Financial Assistance economically benefits at least one company within the group of companies of the Norwegian company. This is a very practical exception, and as a result guarantees from subsidiaries are common in all types of corporate and acquisition financings.

Norwegian entities (and their boards of directors) will have an obligation to act in the best interest of the company and ensure that there is sufficient corporate benefit when undertaking a transaction.

12. Are there any other notable costs, consents or restrictions associated with providing security for, or guaranteeing, acquisition financing in your jurisdiction?

Obtaining security is straightforward in Norway, and there are only nominal registration fees involved in the uptake and perfection of security. The same applies to court fees for enforcement procedures, which are unrelated to the amount of the loan or security in question.

13. Is it possible for a company to give financial assistance (by entering into a guarantee, providing security in respect of acquisition debt or providing any other form of financial assistance) to another company within the group for the purpose of acquiring shares in (i) itself, (ii) a sister company and/or (iii) a parent company? If there are restrictions on granting financial assistance, please specify the extent to which such restrictions will affect the amount that can be guaranteed and/or secured.

Yes, it is now generally possible for the lenders under an acquisition financing to obtain guarantees and security from a Norwegian target company (and its subsidiaries) if the company acquiring the shares is incorporated in an EEA jurisdiction and will control the target company following the acquisition and a detailed procedure is complied with (often referred to in international context as a “whitewash procedure”). Please refer to item 14 below for details.

14. If there are any financial assistance issues in your jurisdiction, is there a procedure available that will have the effect of making the proposed financial assistance possible

Yes, the financial exposure pursuant to such Financial Assistance must not exceed the amounts that the Norwegian target has available for distribution of dividends to its shareholders, and the Financial Assistance must be granted on ordinary, commercial terms. The limitation as to amount does not apply if the buyer is based in the EEA and is, or will following the acquisition, form part of the same group of companies as target.

There is also a requirement that (A) the credit worthiness of the recipient of the Financial Assistance is evaluated by target’s board of directors, (B) the Financial Assistance is approved by the board, and (C) the board grants a declaration to the effect that it will be in the interest of the company to grant the Financial Assistance and give an account for the background and terms of such Financial Assistance. The Financial Assistance must thereafter be approved by the shareholders’ meeting of the target and information must be filed with the Norwegian Business Registry before the Financial Assistance is granted. But validity is still determined based on fact, and corporate benefit must be carefully assessed. Legal advice should be sought in each case.

We estimate around 1-2 weeks for the “whitewash” procedure, depending on the complexity of the transaction, whether the borrower has financial advisors or auditors to assist them etc.

15. If there are financial assistance issues in your jurisdiction

Yes. The parties may consider that the value of the

Norwegian company and/or its assets do not warrant a full “whitewash” procedure, and/or it may follow from agreed security principles that a “whitewash” shall not be required. It is then commonly agreed that the Norwegian target company only guarantees and provides security for the amount of debt that is used to refinance its debt. That is not considered to fall within the scope of the Norwegian financial assistance rules.

16. Does your jurisdiction recognise the concept of a security trustee or security agent for the purposes of holding security, enforcing the rights of the lenders and applying the proceeds of enforcement? If not, is there any other way in which the lenders can claim and share security without each lender individually enforcing its rights (e.g. the concept of parallel debt)?

Norwegian law does not recognise the concept of ‘trust’ as known in English law, but it is possible for one entity to hold a security interest on behalf of itself and others. As such, the transaction security in a Norwegian acquisition financing is typically held by a security agent appointed to act on behalf of all of the finance parties.

17. Does your jurisdiction have significant restrictions on the role of a security agent (e.g. if the security agent in respect of local security or assets is a foreign entity)?

No.

18. Describe the loan transfer mechanisms that exist in your jurisdiction and how the benefit of the associated security package can be transferred.

Loan transfers are documented through a transfer certificate in accordance with international market practice documented by the LMA. When the security is held through an agent, and only the lender position is transferred, no further act is needed to transfer the benefit of the security package.

19. What are the rules governing the priority of competing security interests in your jurisdiction? What methods of subordination are used in your jurisdiction and can the priority be contractually varied? Will contractual subordination provisions survive the insolvency of a borrower incorporated in your jurisdiction?

Priority is based on the doctrine of “first in time, best in right” – meaning that priority is determined based on the time of creation. The exceptions to this rule are significant. The priority of registrable security perfected through registration is generally determined based on when the security was registered.

A number of preferential claims may influence priority, such as statutory charges and salaries. Many preferential claims are only given priority within insolvency proceedings.

Contractual subordination is recognised and customary under Norwegian law and generally takes two different forms: (i) a fully subordinated loan (in bankruptcy the creditor will not be able to claim any dividend on the fully subordinated loan unless all the pari passu debt have been paid) and (ii) a contractual subordination and turnover in favour of another creditor of claims of an ordinary pari passu claim against the borrower (in bankruptcy, any dividend received by the creditor from the bankruptcy estate will be turned over to the other party).

20. Is there a concept of “equitable subordination” in your jurisdiction whereby loans provided by a shareholder (as a creditor) to a company incorporated

No, Norwegian law does not have a concept of equitable subordination.

21. Does your jurisdiction generally (i) recognise and enforce clauses regarding choice of a foreign law as the governing law of the contract, the submission to a foreign jurisdiction and a waiver of immunity and (ii) enforce foreign judgments?

Norwegian entities can enter into contracts governed by foreign law and subject to the jurisdictions of non-Norwegian courts; however, with a caveat that a Norwegian company will usually not be able to circumvent statutory provisions under Norwegian law by way of choosing foreign law as the governing law of the contract.

Final and conclusive judgments obtained in a state that is party to the Lugano Convention of 2007 and/or obtained in any UK jurisdiction (subject to the terms of the convention of 12 June 1961 between the United Kingdom and Norway providing for the reciprocal recognition and enforcement of judgments in civil matters), would be enforced by the courts of Norway.

A judgment of a foreign court or tribunal of any other state that is not party to the Lugano Convention may be directly enforceable in Norway subject to meeting certain requirements.

22. What are the requirements, procedures, methods and restrictions relating to the enforcement of collateral by secured lenders in your jurisdiction?

The Enforcement Act sets out the mandatory provisions for the individual enforcement of most security interests, which procedure shall be made through the Norwegian enforcement authorities. The procedures therein cannot be waived pre-enforcement.

The enforcement measures under the Enforcement Act are primarily a forced sale through a third party (for example, a real estate broker) appointed by the court or by public auction.

Enforcement of a claim requires that the claimant can provide sufficient legal grounds/basis for enforcement. A validly registered and perfected Norwegian charge would for all practical purposes be a ground for enforcement. Further, three requirements have to be met: (1) the underlying claim must be due and payable and subject to a default, (2) the claimant must be entitled to file the petition for enforcement and the claim must be directed towards the correct party, and (3) in respect of a valid registered and perfected Norwegian charge, the claimant need to send a written notice to the defendant two weeks before a petition for enforcement can be filed.

Security established pursuant to the Financial Collateral Act (including but not limited to, bank deposits and financial instruments such as transferable securities) and security over monetary claims are not subject to enforcement through the Enforcement Authority and may be enforced by self-appropriation through the Collateral Agent subject to the alternative enforcement procedures and conditions agreed between the parties in the security agreement.

23. What are the insolvency or other rescue/reorganisation procedures in your jurisdiction?

Outside bankruptcy and voluntary arrangements, court led debt negotiation proceedings and court led restructuring proceedings pursuant to the Reconstruction Act are available, of which only the latter is of practical significance.

24. Does entry into any insolvency or other process in your jurisdiction prevent or delay secured lenders from accelerating their loans or enforcing their security in your jurisdiction?

Automatic stay most practically applies upon the opening of bankruptcy (6 months) and reconstruction proceedings (for the duration of reconstruction proceedings). Certain exceptions apply, including in respect of certain collateral granted as financial collateral under the Financial Collateral Act.

25. In what order are creditors paid on an insolvency in your jurisdiction and are there any creditors that will take priority to secured creditors?

Preferential claims include, in the order of priority, claims related to covering of the cost of administering the bankruptcy estate in general, salaries and certain other remunerations to employees, and governmental taxes. However, these preferential claims are only given priority within insolvency proceedings.

Furthermore, there are certain asset-specific preferential claims which are given priority even outside of insolvency proceedings. Of particular importance in this context are maritime liens. The preferential claims are statutory, but they are not registered in any registry and do not need any separate action to obtain preferred status.

A bankruptcy administrator and reconstruction administrator will have super-priority statutory liens over encumbered assets securing to cover estate costs, with certain exceptions.

26. Are there any hardening periods or transactions voidable upon insolvency in your jurisdiction?

Hardening periods apply in respect of several types of transactions and actions, including (i) security provided

for previously incurred debt, (ii) release of liability, (iii) extraordinary payments, (iv) certain related party transactions, (v) set-off and (vi) transactions conducted in bad faith which either give certain creditors an undue preference or otherwise impairs the recovery of creditors. The hardening periods generally vary from 3 months to two years (depending on the type of transaction/action) although with some important exceptions, such as a 10-year hardening period in instances referred to in (vi).

27. Are there any other notable risks or concerns for secured lenders in enforcing their rights under a loan or collateral agreement (whether in an insolvency or restructuring context or otherwise)?

No material notable risks of a general nature and that are specific to Norway, apart from what is set out above. In case of appropriation of an asset however, valuation discussions may arise.

28. Please detail any taxes, duties, charges or related considerations which are relevant for lenders making loans to (or taking security and guarantees from) entities in your jurisdiction in the context of acquisition finance

Norway levies withholding tax at a 15% rate on certain outbound interest payments made from Norwegian debtors to related parties who are resident in low tax jurisdictions (i.e. where the effective taxation is lower than 2/3 of what it would have been had the foreign entity (lender) been resident in Norway). A general exemption applies for lenders which are genuinely established and carries out genuine economic activity within the EEA.

29. Are there any other tax issues that foreign lenders should be aware of when lending into your jurisdiction?

There are limitations on the level of interest costs that are allowed for tax deduction in Norway (basically calculated as a formula on taxable EBITDA (earnings before interest, taxes, depreciation and amortisation) of the Norwegian entities). Both interest paid to related and non-related lenders (i.e., banks and bondholders) can be subject to a limitation of tax deduction. An exemption applies for a Norwegian borrower in a corporate group if the equity ratio of the company, or the Norwegian part of the corporate group, is at least as high as the equity ratio of the corporate group as a whole. As a result of this, parent company guarantees are no longer commonly part of the security package in Norwegian financings (see item 14).

Note, however, that interest costs paid by a Norwegian borrower to related lenders outside a corporate group can still be subject to limitation of tax deduction, and Norwegian tax advice should be obtained early when setting up a holding structuring for acquiring a Norwegian company from abroad.

30. What is the regulatory framework by which an acquisition of a public company in your jurisdiction is effected?

The acquisition of companies with shares admitted to trading on a regulated market in Norway is mainly done through takeover offers for the shares, subject to rules which are implemented pursuant to Directive 2004/25/EC on takeover bids. Oslo Børs is take-over authority.

31. What are the key milestones in the timetable (e.g. announcement, posting of documentation, meetings, court hearings, effective dates, provision of consideration, withdrawal conditions)?

The offeror must make a notification to Oslo Børs once an obligation to make a mandatory offer has been triggered, or once a decision to make a voluntary offer is made, which is published by Oslo Børs. The offeror must prepare an offer document subject to approval by Oslo Børs, to be sent to all target shareholders. A mandatory offer must be made within four weeks and the offer period must be minimum four and maximum six weeks. A voluntary offer must be made within a reasonable time and the offer period must be minimum two and maximum ten weeks. The target board must provide a statement on the offer within one week prior to the expiry of the offer period. Settlement must be made within 14 days of expiry of the acceptance period. A voluntary offer is usually settled within 14 days after the offer has become unconditional.

32. What is the technical minimum acceptance condition required by the regulatory framework? Is there a squeeze out procedure for minority hold outs?

There is no minimum acceptance condition to complete

an offer, but the offeror can squeeze-out the remaining minority at more than 90% ownership. There is an immediate transfer of ownership upon such resolution, provided that the offer price is deposited in a separate bank account. The minority shareholders may oppose to the offered price, but not to the squeeze-out as such.

33. At what level of acceptance can the bidder (i) pass special resolutions, (ii) de-list the target, (iii) effect any squeeze out, and (iv) cause target to grant upstream guarantees and security in respect of the acquisition financing?

i. At least two-thirds of the votes cast at the general meeting of the target
ii. Same majority as required for changes to the articles of association. The target can then apply to Oslo Børs for a delisting.
iii. More than 90% of the shares in target (see section (iii) above)
iv. Upstream guarantees and security are normally only given when target is wholly owned by the bidder. The restrictions outlined in item 11 above apply in relation to Financial Assistance granted prior to the acquisition, and the exemptions in relation to group of companies generally apply when the bidder has achieved determinative influence over the target (which includes owning so many shares or parts in target that they represent a majority of the votes in target).

34. Is there a requirement for a cash confirmation and how is this provided, by who, and when?

A mandatory offer must provide a pure cash consideration alternative and the total offer price must be guaranteed by a financial institution with authorization to conduct business in Norway. The offer price shall as a main rule be the highest payment the offeror has made or agreed in the period six months prior to the point at which the mandatory offer was triggered.

A voluntary offer can be made with cash and/or shares as consideration.

35. What conditions to completion are permitted?

A mandatory offer must be unconditional.
There are significant discretion in terms of conditions for a voluntary offer. The most common conditions in a voluntary offer are acceptance level (normally 90% or 2/3), regulatory approvals, recommendation from target board and no material adverse change.

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